

# EXHIBIT 1



**Linda S. Adams**  
Secretary for  
Environmental Protection

## State Water Resources Control Board

### Division of Water Rights

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**Arnold Schwarzenegger**  
Governor

December 19, 2006

Magalie R. Salas, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

Dear Ms. Salas:

### COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE OROVILLE FACILITIES, FERC #2100

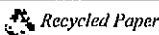
State Water Resources Control Board (State Water Board) staff have reviewed the Draft Environmental Impact Statement (DEIS) prepared by the Federal Regulatory Energy Commission (Commission) for the Oroville Facilities (Project), FERC #2100, to determine: 1) if the impacts and/or benefits of the Project and alternatives are disclosed; and 2) if the DEIS fully discloses whether the alternatives will meet the water quality standards.

#### **Basin Plan/Comprehensive Plans**

The Department of Water Resources (DWR), the licensee, must obtain water quality certification from the State Water Board, pursuant to Section 401 (a)(1) of the Federal Clean Water Act (CWA) (33 U.S.C. §1341) before the Commission can issue a new license for the Project. DWR must demonstrate that the Project will comply with the Water Quality Control Plan for the Central Valley Region before certification can be issued. Under section 303 of the CWA and under the Porter-Cologne Water Quality Control Act, the Central Valley Regional Water Quality Control Board has adopted, and the State Water Board and U.S. Environmental Protection Agency (USEPA) have approved, the *Water Quality Control Plan for the Sacramento and San Joaquin Rivers* (Basin Plan) (Central Valley Regional Water Quality Control Board, 1998). The Basin Plan designates the beneficial uses of waters to be protected along with the water quality objectives necessary to protect those uses. Beneficial uses designated for Lake Oroville include municipal and domestic supply, irrigation, power generation, contact and non-contact recreation, freshwater habitat (cold and warm), spawning habitat (cold and warm), and wildlife habitat. Beneficial uses for the Feather River from the fish barrier dam to the Sacramento River are municipal and domestic supply, irrigation, contact and non-contact recreation, canoeing and rafting, migration (cold and warm), freshwater habitat (cold and warm), spawning habitat (cold and warm), and wildlife habitat.

In order for the State Water Board to issue water quality certification for the Project, DWR must demonstrate compliance with all water quality objectives in the Basin Plan

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under its control, as well as other water quality objectives that the Project may affect. DWR must also demonstrate that the Project does not impair the beneficial uses of the Feather River or Lake Oroville. If the Project does not comply with one or more of the water quality objectives, then DWR must describe the actions that it will take to bring its Project into compliance with the applicable water quality requirements in order to protect and maintain the beneficial uses.

An application for water quality certification must describe steps that have been or will be taken to avoid, minimize, or compensate for the loss of or significant adverse impact to the beneficial uses of waters of the State. Cal. Code Regs., tit. 23, §3856(h)(6). Section 10(a)(2) of the Federal Power Act requires the Commission to consider the extent to which a project is consistent with the Basin Plan, which is a comprehensive plan (DEIS page 375). The Environmental Consequences section of an EIS must discuss the possible conflicts between the proposed action and the objectives of federal, regional, State, and local land use plans, policies, and controls (NEPA regulations §1502.16). State Water Board staff have determined that the DEIS does not adequately and fully evaluate the ability of the alternatives to comply with the water quality requirements in the Basin Plan. The DEIS contains overly broad statements about compliance with the Basin Plan without providing adequate supporting documentation. For example, on page 375, the DEIS concludes there are no conflicts between the Project and seventeen comprehensive and other resource plans. Information to support this conclusion, however, is not provided. The final EIS must disclose whether the Project under the baseline condition will comply with the Basin Plan, and must address whether the alternatives will meet the water quality requirements in the Basin Plan.

#### **Baseline**

It is important to differentiate existing conditions from the no-action alternative. Using existing conditions as the baseline may be appropriate under NEPA, but doing so may obscure the ongoing impacts of the Project, and may render the EIS less valuable to the Commission as a decision-making tool. Existing conditions are different from the no-action alternative because current operations are different from continued operation under the existing license. Another difference between existing conditions and the no-action alternative is that existing conditions represent environmental conditions at a fixed point in time, whereas under the no-action alternative there will be changes in the environment. The no-action alternative should be compared to existing conditions and the other alternatives in order to show what will happen if the proposed action is not taken. The final EIS should use existing conditions as the baseline, describe the baseline, and clearly define the no-action alternative.

#### **Alternatives**

The range of alternatives is too narrow and the alternatives are not adequately described. The DEIS evaluates three alternatives: the baseline or no-action alternative; DWR's proposal; and the Commission staff alternative. As stated above, the difference between the baseline condition and the no-action alternatives must be described. The

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screening process used to select the alternatives must also be provided. The Commission staff alternative is a slightly modified version of DWR's proposal, and, as a result, the DEIS evaluates only one major alternative. The DEIS therefore provides little basis for comparison to the no-action alternative or baseline. The final EIS should include a reasonable range of alternatives that may be feasibly carried out based on technical, economic, and environmental factors.

The description of DWR's alternative for water temperature in the low flow and high flow channels is incomplete. The DEIS (table on pages 26 and 27) implies that DWR would be required to meet the temperature requirements for the High Flow Channel (HFC). The Settlement Agreement (SA) does not require DWR to meet the temperature requirements listed in the table. These temperatures (Table 2 in the SA) are targets that will be used to develop temperatures that can be feasibly achieved. The final EIS should fully describe the alternative to allow a thorough comparison with other alternatives, including the baseline condition.

Under Section B108 of the SA, DWR is required to develop a reconnaissance study of potential facilities modifications to address temperature habitat needs for anadromous fish in the Low Flow Channel (LFC) and HFC. The alternatives for consideration include Palermo Canal improvements, Hyatt intake extension, replacement of the river valves with valves specifically designed to incrementally control water releases, construction of a diversion canal around or through the Thermalito Afterbay, and construction of an alternative Thermalito Afterbay Outlet and channel. These alternatives should be evaluated in the final EIS.

The description of the pump back operations described in section 2.1.3.4. is incomplete. Pump back operations impact water temperature in the Project and in the HFC. A more thorough description of historic pump back operations, including the timing, flow, and duration, should be included. This background information is needed to describe how this operation impacts water temperature and water quality, and how future Project operations will impact pump back operations.

## **Water Quantity and Quality**

### Affected Environment

It is important to compare the current flow regime with the pre-dam hydrology to understand the impact of the alternatives on beneficial uses affected by geomorphic processes, water quality, and fisheries. The DEIS compares the current flows in the LFC with the pre-dam hydrology (page 69-70). Flows in the HFC are not compared with the pre-dam condition. A comparison with pre-dam conditions should be included in the final EIS.

The DEIS conclusion that water temperatures generally meet the Basin Plan objectives (page 78) is not supported by evidence in the record. Studies have shown it is unlikely that adult Chinook salmon can use the Feather River below the Thermalito Afterbay

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Outlet except as a migration corridor (Department of Water Resources, 2004). Water temperature monitoring in 2002 and 2003 showed that the temperature of water released from Thermalito Afterbay was as much as 11.3°F higher than that of incoming water (Department of Water Resources, 2005). DWR concluded that increased incidence of disease, developmental abnormalities, increased in-vivo egg mortality, and temporary cessation of migration could occur due to elevated water temperatures in some areas of the lower Feather River (Department of Water Resources, 2004).

The statement on page 87 of the DEIS that there is no current Office of Environmental Health Hazard Assessment (OEHHA) fish consumption advisory for the Feather River is incorrect. OEHHA issued a draft health advisory including safe eating guidelines for fish from the Lower Feather River (Butte, Yuba, and Sutter Counties). The advisory contains an evaluation of elevated mercury levels in fish from the lower Feather River and provides safe eating guidelines for these water bodies ([http://www.oehha.ca.gov/fish/so\\_cal/pdf\\_zip/FeatherCRNR081006.pdf](http://www.oehha.ca.gov/fish/so_cal/pdf_zip/FeatherCRNR081006.pdf)).

Page 13 of the DEIS states that the baseline and no-action alternative will be discussed in the affected environment section. All of the current impacts of the Project have not been included in this section. The impact of reduced water temperature on rice production should be included. DWR conducted monitoring for bacteria at recreation areas during 2002 and 2003. Samples from the North Forebay Recreation Area beach had consistently high fecal coliform levels that exceed Department of Health Services (DHS) guidance and Basin Plan objectives. Results also showed that nearly every sample from two sites in the North Forebay, and many sites in the South Forebay exceeded DHS and U.S. Environmental Protection Agency criteria for enterococcus bacteria (Department of Water Resources, September 2004). This information should be included in this section. In 2005 a large bloom of the blue-green algae *Anabaena flos-aquae* was observed in the Middle Fork Feather River arm of Lake Oroville. *Anabaena flos-aquae* can produce toxins (anatoxin-a, a neurotoxin) at levels hazardous to public health, pets, and wildlife. *Anabaena flos-aquae* may also have the ability to produce compounds that create taste and odor problems in water. At this time it is not known if this algal bloom produced toxins or caused taste and odor problems. Phosphorus has been measured in Lake Oroville at levels that can produce algae blooms (Department of Water Resources, September 2004). The impact on water quality and recreation of large algae blooms in Lake Oroville should be disclosed in the final EIS.

#### Environmental Effects

The general statement on page 96 of the DEIS that waters in the Project area meet the water quality standards for temperature, dissolved oxygen, nutrients, pH, and metals is not supported by documentation in the DEIS or other available information. The Feather River is listed as an impaired water body for mercury on the Clean Water Act section 303(d) list. Mercury was found in 214 individual fish sampled from the Project, with values ranging as high as 1.26 mg/kg. The USEPA criteria is 0.3 mg/kg for the

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protection of human health. Temperature, as previously stated in the section on affected environment, is also impaired.

The DEIS does not make a sufficiently clear distinction between the impacts of flow and the impacts of Project operations on water temperature. The DEIS also does not adequately discuss water temperature impacts on the HFC. Water temperature in the LFC and HFC are impacted by both flow and Project operations. Improvements to water temperature can be made through changes in flow as well as through physical changes in Project facilities and operations. This distinction is important because changes in operations may have a greater impact on water temperature than Project improvements.

The SA includes provisions to complete a reconnaissance study of potential facilities modifications to improve water temperature by the end of 2006. The staff analysis on page 97 of the DEIS states that "without knowing which of the facility modifications would be implemented at this time, staff can only analyze the effects that would exist under the interim and post-facility modification temperature requirements." The facility modifications proposed in the reconnaissance study, however, are also part of the proposed Project and should also be evaluated. Construction of these facilities, as well as operational changes, may have significant environmental impacts. These potential impacts must be described and evaluated. As discussed above, alternatives that include these proposed projects for evaluation should be developed and included in the final EIS.

DWR delivers water to rice growers from several different points in Thermalito Afterbay. After construction of Oroville Dam, water temperatures became less suitable for rice cultivation during the early irrigation season and typically have not met the threshold required for rice production during the summer (Department of Water Resources, July 2004). Resolution of this issue could require physical changes at the Thermalito Afterbay to control temperature. The impacts and benefits of alternatives to improve water temperature for rice production should be evaluated and included in the final EIS.

The DEIS concludes that improving water quality within the North Forebay swim area, and specifically within the cove, would allow the beach to remain open to the public throughout the peak season. Despite identifying this impact of water quality on swimming, and the need to improve water quality, the DEIS did not identify alternatives to avoid or reduce the impact. Alternatives that will mitigate or reduce this impact should be developed and included in the final EIS.

## **Aquatic Resources**

### Affected Environment

The DEIS contains a discussion of Ceratomyxosis and states that *Ceratomyxa shasta*, and a myxosporean parasite are prevalent in waters of the Thermalito Complex and Lake Oroville (page 125). The intermediate host of *C. shasta* is the polychaete

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*Manayunkia speciosa* that produces myxospores that infect fish. Project operations can impact rate of infection by increasing the preferred habitat for the polychaete and through increased stress from elevated water temperature. The final EIS should include a discussion of the impacts of Ceratomyxosis on anadromous fish in the Feather River and other fish in Lake Oroville. Additional studies may be needed to determine if the Project increases the spread of this disease.

### **Threatened and Endangered Species**

#### Fish Species

The DEIS does not adequately describe impacts of the current Project on spring-run Chinook salmon (page 160). Construction of the Project has restricted the spatial separation of spring and fall run Chinook salmon. The reduction in spawning habitat has increased the rate of redd superimposition, which has impacted spring run salmon that spawn a few weeks prior to fall run. In addition, the Feather River Fish Hatchery has not separated spring and fall run fish when collecting eggs. This has resulted in introgression (genetic interbreeding) at a very high rate. The hatchery produces spring-run Chinook salmon that is genetically more similar to fall-run (page 137). Article A105 of the SA requires DWR to develop a weir construction and operations plan consistent with the Project biological opinion(s). Actual construction of the weir is not required until 12 years after license issuance. The impact of waiting 12 years to install the weir, and the potential impact of the weir on all species of fish in the Feather River should be described. Monitoring and mitigation measures may be required to avoid impacts to species other than salmon. In addition, water quality impacts from construction of the weir should be described.

The DEIS concludes that under current operations water temperatures are consistent with those that "may increase incidence of disease and mortality, in-vivo egg mortality, and developmental abnormalities occurring during spawning migrations and pre-spawning holding" (page 179) and that excessively high water temperatures downstream of the outlet have precluded steelhead rearing. The DEIS concludes that the proposed measures to support anadromous fish will improve water quality except under the most extreme conditions. It is impossible, however, to analyze the water temperature impact of potential facilities modifications being developed by DWR on anadromous fish. As stated above, the SA only includes temperature targets, not the actual temperatures that will be achieved. The actual temperatures that can be achieved will not be known until alternatives are developed and modeled. Because the actual temperatures that will be achieved are unknown, the benefits of those temperatures on anadromous fish cannot be evaluated at this time. If this is the case, the final EIS should disclose that the impact of the proposed Project is not known.

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**Conclusion**

State Water Board staff appreciates the opportunity to comment on this DEIS. Please contact me at (916) 341-5341 if you need additional information or would like to discuss these comments.

Sincerely,

Russ J. Kanz  
Staff Environmental Scientist

cc: FERC Service List

Beth Lawson  
Sharon Stohrer  
State Water Resources Control Board  
Division of Water Rights  
1001 I Street, 14<sup>th</sup> Floor  
Sacramento, CA 95814

**References:**

Central Valley Regional Water Quality Control Board. 1998. Water quality control plan for the Sacramento and San Joaquin River Basins, Forth Edition. September 15, 1998

Department of Water Resources. 2004. Final Report, Evaluation of Oroville facilities operation on water temperature related effects on pre-spawning adult Chinook salmon and characterization of holding habitat SP-F10, tasks 1D and 1E. June 2004

Department of Water Resources. 2005. Application for new license, Oroville Facilities FERC project no. 2100. January 2005

Department of Water Resources. July 2004. SPW6 Project effects on temperature regime. July 2004

Department of Water Resources. September 2004. Project effects on water quality designated beneficial uses for surface water. September 2004





Alan C. Lloyd, Ph.D.  
Agency Secretary

## State Water Resources Control Board

### Division of Water Rights

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Arnold Schwarzenegger  
Governor

March 30, 2006

Magalie R. Salas, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N. E.  
Washington, DC 20426

Dear Ms. Salas:

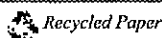
### COMMENTS ON NOTICE OF APPLICATION AND APPLICANT PREPARED ENVIRONMENTAL ASSESSMENT, OROVILLE FACILITIES, FERC #2100

State Water Resources Control Board (State Water Board) staff have reviewed the Application for New License and Preliminary Draft Environmental Assessment (PDEA) prepared by the Department of Water Resources (DWR) for the Oroville Facilities (Project), Federal Energy Regulatory Commission (Commission) #2100. By notice issued September 12, 2005, along with subsequent extensions, FERC has requested that comments and recommendation for the Project be submitted by March 31, 2006. After reviewing the PDEA, State Water Board staff identified several problems that may limit the adequacy of the document for compliance with the National Environmental Quality Act (NEPA).

#### Baseline

The PDEA prepared for the Project does not adequately describe the baseline conditions as required under NEPA. To adequately evaluate the significance of impacts, it is important to establish a baseline against which alternatives can be evaluated. The baseline needs to be differentiated from the no-action alternative (i.e., what will occur without the federal action). However, the baseline can be, but is not necessarily, the no-action alternative. Another difference between existing conditions and the no-action alternative is that existing conditions represent environmental conditions at a fixed point in time, whereas the no-action alternative represents conditions where changes will be made to the environment. The no-action alternative should be compared to existing conditions and the other alternatives in order to show what will happen if the proposed action is not taken. It is also important to determine if the baseline condition is static, improving, or degrading over time. In particular, DWR has not adequately described the baseline conditions for water quality in the PDEA. While the PDEA mentions that the Project alters water temperature in the Feather River, the impact of water temperature alteration on anadromous fish is not adequately described (PDEA page 5.4-31 and Table 5.5-6). The Commission needs to use and describe existing conditions as the baseline and clearly define the no-action alternative in the NEPA document.

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#### Water Quality Certification

It is important to remember the analysis of water quality impacts in NEPA and the California Environmental Quality Act (CEQA) may be different from that required to obtain water quality certification. For this Project, the on-going impairments to water quality may not be considered significant impacts under either NEPA or CEQA. However, before the State Water Board can issue water quality certification for the Project, DWR must demonstrate that the operation of the Project can comply with the water quality standards in the Water Quality Control Plan for the Sacramento and San Joaquin River Basins (Basin Plan).

#### Settlement Agreement

On March 21, 2006, a number of parties signed a settlement agreement for the licensing of this Project. State Water Board staff will review the settlement agreement to determine if the proposed measures will achieve compliance with the water quality standards in the Basin Plan. If the proposed measures alone will not result in compliance with the water quality standards, State Water Board staff will condition any water quality certification to ensure that the Project will meet the water quality standards. Finally, because the PDEA was prepared prior to the execution of the settlement, the protection, mitigation, and enhancement measures from the settlement were not analyzed in the document. The Commission should analyze the settlement conditions as a Project alternative in its NEPA document.

#### Cumulative Impacts

The Oroville Facilities are part of the State Water Project, which is a very large water supply system that is coordinated with the federal Central Valley Project. These coordinated projects have regional cumulative impacts on water quality, fisheries, and flood control. It is reasonable and foreseeable that the State Water Project and the federal Central Valley Project will make changes to the operation of their projects to address their impacts on water quality, fisheries, and flood control. Currently, there is a great deal of concern over the pelagic organism decline (POD) in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Flow and water quality are two of the issues being studied that may be causing the POD. It is important to consider the impact these issues may have on the future operation of this Project.

Please note that Russ Kanz has been substituted for Sharon Stohrer as a contact with the State Water Board. If you have any questions you may call me at (916) 341-5341.

Sincerely,

Russ J. Kanz  
Staff Environmental Scientist

# EXHIBIT 2

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FILED  
Butte County  
Superior Court  
AUG 21 2008  
Sherol Strickland Clerk  
By CHRISTENSEN Deputy

16  
17 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
18 COUNTY OF BUTTE

19 COUNTY OF BUTTE, a political subdivision of the  
20 State of California;  
21 Petitioner,

Butte County Case No.

**144283**

22 v.

PETITION FOR WRIT OF MANDATE

[NO FILING FEE REQUIRED  
(Gov. Code, § 6103)]

23 DEPARTMENT OF WATER RESOURCES, a public  
24 agency of the State of California;  
25 Respondent,

26 CALIFORNIA STATE WATER RESOURCES  
27 CONTROL BOARD; CALIFORNIA DEPARTMENT  
28 OF BOATING AND WATERWAYS; CALIFORNIA  
DEPARTMENT OF FISH AND GAME;  
CALIFORNIA DEPARTMENT OF PARKS AND  
RECREATION; CITY OF OROVILLE; TOWN OF  
PARADISE; FEATHER RIVER RECREATION AND  
PARKS DISTRICT; OROVILLE PARKS  
COMMISSION; OROVILLE REDEVELOPMENT  
AGENCY; ALAMEDA COUNTY FLOOD CONTROL  
AND WATER CONSERVATION DISTRICT, ZONE  
7; ALAMEDA COUNTY WATER DISTRICT;  
ANTELOPE VALLEY-EAST KERN WATER  
AGENCY; CASTAIC LAKE WATER AGENCY;  
CENTRAL COAST WATER AUTHORITY;  
COACHELLA VALLEY WATER DISTRICT;

1 COUNTY OF KINGS; CRESTLINE-LAKE  
2 ARROWHEAD WATER AGENCY; DESERT  
3 WATER AGENCY; EMPIRE WEST SIDE  
4 IRRIGATION DISTRICT; KERN COUNTY WATER  
5 AGENCY; LITTLEROCK CREEK IRRIGATION  
6 DISTRICT; METROPOLITAN WATER DISTRICT  
7 OF SOUTHERN CALIFORNIA; MOJAVE WATER  
8 AGENCY; NAPA COUNTY FLOOD CONTROL  
9 AND WATER CONSERVATION DISTRICT; OAK  
10 FLAT WATER DISTRICT; PALMDALE WATER  
11 DISTRICT; SAN BERNARDINO VALLEY  
12 MUNICIPAL WATER DISTRICT; SAN GABRIEL  
13 VALLEY MUNICIPAL WATER DISTRICT; SAN  
14 GORGONIO PASS WATER AGENCY; SANTA  
15 CLARA VALLEY WATER DISTRICT; SOLANO  
16 COUNTY WATER AGENCY; STATE WATER  
17 CONTRACTORS, INC.; TULARE LAKE BASIN  
18 WATER STORAGE DISTRICT; AMERICAN  
19 RIVERS; AMERICAN WHITEWATER; BERRY  
20 CREEK CITIZENS ASSOCIATION; CALIFORNIA  
21 STATE HORSEMEN'S ASSOCIATION;  
22 CALIFORNIA STATE HORSEMEN'S  
23 ASSOCIATION REGION II; CHICO  
24 PADDLEHEADS; CITIZENS FOR FAIR AND  
25 EQUITABLE RECREATION; FEATHER RIVER  
26 LOW FLOW ALLIANCE; INTERNATIONAL  
27 MOUNTAIN BICYCLING ASSOCIATION; LAKE  
28 OROVILLE BICYCLIST ORGANIZATION;  
OROVILLE AREA CHAMBER OF COMMERCE;  
OROVILLE DOWNTOWN BUSINESS  
ASSOCIATION; OROVILLE ECONOMIC  
DEVELOPMENT CORPORATION; OROVILLE  
RECREATION ADVISORY COMMITTEE;  
OROVILLE ROTARY CLUB; ARTHUR G.  
BAGGETT, JR.; D.C. JONES.

Real Parties in Interest.

Petitioner County of Butte ("Butte") prays for this Court to issue its writ of mandate directed against respondent Department of Water Resources ("DWR") on the following allegations:

## INTRODUCTION

1  
2 1. This petition challenges the failure of respondent Department of Water Resources (DWR) to  
3 comply with the California Environmental Quality Act (CEQA, Pub. Res. Code, § 21000, et seq.)  
4 when it certified its Final Environmental Impact Report (FEIR) and rendered final approval of a  
5 project that would extend for 50 years the operating license for its Oroville hydroelectric facility  
6 (FERC Project 2100). DWR serves as state lead agency for the relicensing project, while the  
7 Federal Energy Regulatory Commission (FERC) serves as federal lead agency. Originally licensed  
8 in 1957, the Oroville facility, located within Butte County on the Feather River, generates annual  
9 net power benefits that FERC has valued at almost \$26 million annually. Oroville is also the key  
10 northern water storage facility in the DWR-managed State Water Project (SWP), which provides  
11 water, valued conservatively in hundreds of millions of dollars annually, to state water contractors  
12 serving more than 23 million Californians.  
13  
14

15 2. Although DWR's FEIR represents that its project, a 2006 Settlement Agreement submitted to  
16 FERC (SA, or "the project"), has "near-unanimous" support, that asserted consensus excluded  
17 Butte County, which has borne millions of dollars annually in environmental and services costs  
18 stemming from Oroville operations, which costs DWR has never mitigated. It also excluded  
19 Plumas County, the Feather River's northernmost county of origin, as well as other public entities  
20 and environmental organizations.  
21

22 3. The Oroville facility, while providing benefits largely concentrated in southern California,  
23 and south of the Bay-Delta estuary (Delta), has created substantial environmental, land  
24 management, and water use impacts within Butte County, as well as major socioeconomic impacts  
25 producing significant environmental consequences. While the 50-year license renewal proposed in  
26 the project would perpetuate and compound those impacts, DWR failed to provide any meaningful  
27 mitigation for them. Butte does not seek to undermine the benefits of Oroville operations, but  
28

1 rather, through the imposition of feasible mitigation measures and the full enforcement of DWR's  
2 CEQA duties as state lead agency, seeks redress for harmful inequities burdening Butte.

3 4. Four foundational errors so seriously distorted DWR's analysis that they fatally  
4 compromised the FEIR's ability to inform decision-making. The first is DWR's avoidance of  
5 rigorous climate change assessment. The California Attorney General has emphasized elsewhere  
6 that project applicants must rigorously assess climate change to comply with CEQA. In its 2005  
7 California Water Plan Update and recent reports to the Governor of California, DWR has written  
8 repeatedly that climate change will have a major effect on SWP operations. Oroville, as the SWP's  
9 primary storage and power generation facility, plays a central role in SWP operations. Changing  
10 climatic conditions will impact Oroville's flood control, reservoir storage levels, upstream and  
11 downstream flow levels, water temperatures, power generation, water quality, fisheries, and  
12 recreation.  
13

14 5. Rather than rigorously assessing climate change, DWR's Oroville FEIR presumes that  
15 hydrologic variability from the previous century "is expected to continue in the foreseeable future"  
16 and that it would be "speculative" to further analyze other climate change scenarios. The FEIR also  
17 suggests that there would be "further opportunities in the future" to address climate change at the  
18 "next relicensing period"—in other words, *half a century after project implementation*. DWR's  
19 attempted deflection of serious climate change assessment to future generations infected all key  
20 elements of the FEIR, including assessment of the environmental setting, direct and cumulative  
21 impacts, feasible alternatives, and mitigation. Due to this error, the FEIR is predicated upon a  
22 hypothetical future that DWR knows to be dangerously false.  
23

24 6. A second foundational error undermines the FEIR. Oroville operations are tied to the Delta,  
25 because Oroville facilities provide environmental water to the Delta, and their releases directly  
26 affect Delta water quality. But in its FEIR, DWR failed to analyze how changing conditions in the  
27  
28

1 Delta will affect the timing or volume of water releases from its Oroville facilities. Even though  
2 DWR was aware of recent judicial decisions invalidating the Operating Criteria and Plan (OCAP)  
3 Biological Opinions (BO) for salmonids and Delta smelt, it avoided serious new analysis, based  
4 upon speculation that Oroville releases would be "one of many" inputs to Delta hydrology.

5  
6 7. In a third foundational error, the FEIR does not identify as potentially significant impacts  
7 from perpetuating old operating rules through its new decision-making. For example, it assumes  
8 the no-project alternative will create no impacts because old rules would remain in place. But that  
9 assumption is specious, because reauthorizing an old operating scheme can significantly change the  
10 environmental status quo. If the old operating scheme was causing declines in the quality of  
11 recreational resources or wildlife habitat, for example, a choice to perpetuate those rules could lead  
12 to additional environmental harms far exceeding those that already have occurred. Moreover, the  
13 changed context for SWP operation, due to such factors as climate change and Delta conditions, is  
14 likely to render the rest of the environment vastly different in the future.

15  
16 8. The FEIR's fourth foundational error is its failure to address the project's environmentally  
17 significant socioeconomic consequences for Butte. Butte County is among the most financially  
18 distressed counties in California, and is the only such county to have received the state designation  
19 of "acute fiscal distress" three times since 1990. Butte has nonetheless spent millions of dollars per  
20 year providing government services necessitated by Oroville operations while also losing millions  
21 annually in lost tax revenue due to Oroville operations. Yet DWR refused to provide any mitigation  
22 to Butte of the project's environmentally significant socioeconomic impacts, based upon the  
23 indefensible conclusion that the project would not result in any significant direct or cumulative  
24 impacts. DWR also refused to provide feasible mitigation of these impacts at negligible cost to  
25 SWP beneficiaries.  
26  
27  
28



1 9. The FEIR contains numerous other CEQA errors, including failure to provide a consistent  
2 and accurate project definition, and failure to address and mitigate numerous other project impacts.

3 **PARTIES, VENUE AND JURISDICTION**

4 10. Petitioner County of Butte (Butte) is a political subdivision of the State of California,  
5 charged by the California Constitution with the duty to protect the environment and economy of the  
6 people and resources within its jurisdiction. The Oroville facility addressed in this petition is  
7 located entirely inside Butte County, and has imposed significant environmental impacts upon Butte  
8 County, including but not limited to impacts to land management, water use, and socioeconomic  
9 impacts with environmental consequences. DWR's project addressed in this petition, if approved  
10 and implemented, would continue and exacerbate these impacts to Butte over the 50-year period  
11 proposed for DWR's new operating license on FERC Project No. 2001.  
12

13 11. Respondent Department of Water Resources (DWR) is a department of the State of  
14 California charged with the duty to operate and manage the SWP consistently with state law. DWR  
15 operates and manages the SWP by constructing, maintaining and owning its facilities, and by  
16 contracting with each of 29 local state water contractors, including petitioner Butte. The Oroville  
17 facility is an integral part of the SWP. Wat. Code, § 12934(d). DWR serves as state lead agency for  
18 the project, and is the proponent of the FERC project application to continue operation of the  
19 hydroelectric component of its Oroville operations for an additional 50-year period (FERC Project  
20 No. 2100). In its review of that application, FERC serves as federal lead agency.  
21

22 12. DWR's FEIR and final state project approval would also likely prejudice other agencies'  
23 decision-making relating to the license, including that of the State Water Resources Control Board  
24 (State Board), which will rely on DWR's FEIR as a responsible agency under Public Resources  
25 Code section 21167.3 in its review of compliance with section 401 of the Clean Water Act.  
26  
27  
28

1 13. Butte does not believe that there are any "recipients of an approval" from DWR's FEIR and  
2 final Oroville project decision that would qualify them as real parties in interest as the California  
3 Legislature intended that term to apply in Public Resources Code section 21167.6.5. Nonetheless,  
4 in an abundance of caution, and because at least one court has applied the "recipients of approval"  
5 term loosely (*County of Imperial v. Superior Court* (2007) 152 Cal. App. 4th 13), Butte here names  
6 as real parties in interest those parties that conceivably might contend they qualify as "recipients of  
7 an approval" receiving specific benefits under California law based upon DWR's final project  
8 decision. These named real parties in interest include the following:  
9

10 a. Real party in interest California State Water Resources Control Board, a public  
11 agency organized under California law, is the California state entity charged with reviewing DWR's  
12 pending application for water quality certification for the project as required under section 401 of  
13 the federal Clean Water Act. For DWR's section 401 application to be complete, it was first required  
14 to submit a certified EIR on the proposed project to the State Board, which would utilize that EIR  
15 acting as a responsible agency.  
16

17 b. Real parties in interest California Department of Boating and Waterways,  
18 Department of Fish and Game (DFG), and Department of Parks and Recreation (DPR) are state  
19 agencies organized under the laws of California. They are signatories to the 2006 Settlement  
20 Agreement (SA) referenced as the project in DWR's FEIR. DWR has identified the California  
21 Department of Boating and Waterways as a CEQA state responsible agency, and identified DFG  
22 and DPR as CEQA trustee agencies.  
23

24 c. Real parties in interest City of Oroville and Town of Paradise are political  
25 subdivisions of the state of California. They are signatories to the SA.

26 d. Real parties in interest Feather River Recreation and Parks District; Oroville Parks  
27 Commission; Oroville Redevelopment Agency; Alameda County Flood Control and Water  
28

1 Conservation District, Zone 7; Alameda County Water District; Antelope Valley–East Kern Water  
2 Agency; Castaic Lake Water Agency; Central Coast Water Authority; Coachella Valley Water  
3 District; County of Kings; Crestline–Lake Arrowhead Water Agency; Desert Water Agency;  
4 Empire West Side Irrigation District; Kern County Water Agency; Littlerock Creek Irrigation  
5 District; Metropolitan Water District of Southern California; Mojave Water Agency; Napa County  
6 Flood Control and Water Conservation District; Oak Flat Water District; Palmdale Water District;  
7 San Bernardino Valley Municipal Water District; San Gabriel Valley Municipal Water District;  
8 San Geronimo Pass Water Agency; Santa Clara Valley Water District; Solano County Water  
9 Agency; and Tulare Lake Basin Water Storage District are public agencies organized under the  
10 laws of California. They are signatories to the SA.  
11

12 e. Real party in interest State Water Contractors, Inc. (SWC), is a non-profit association  
13 of 27 public agencies in California, organized under California law, that purchase water under  
14 contract from the SWP. SWC is a signatory to the SA. Butte and another SWP contractor, the  
15 Plumas County Flood Control and Water Conservation District are not members of SWC.  
16

17 f. Real parties in interest American Rivers; American Whitewater; Berry Creek Citizens  
18 Association; California State Horsemen's Association; California State Horsemen's Association  
19 Region II; Chico Paddleheads; Citizens for Fair and Equitable Recreation; Feather River Low Flow  
20 Alliance; International Mountain Bicycling Association; Lake Oroville Bicyclist Organization;  
21 Oroville Area Chamber of Commerce; Oroville Downtown Business Association; Oroville  
22 Economic Development Corporation; Oroville Recreation Advisory Committee; and Oroville  
23 Rotary Club are, to the best of petitioners' knowledge, non-profit organizations organized under  
24 the laws of California. They are signatories to the SA.  
25

26 g. Arthur G. Baggett, Jr. and D.C. Jones are, to the best of petitioners' knowledge,  
27 individuals residing within the State of California. They are signatories to the SA.  
28

1 14. Pursuant to Code of Civil Procedure section 393(b), venue for this action is appropriate in  
2 Butte County, the location of the Oroville facilities and DWR's project. The affirmative acts of  
3 DWR recorded in its July 22, 2008 notice of determination resulted in wrongs that were felt, at  
4 least in large part, in Butte County.

5 15. This verified petition for writ of mandate is authorized by, and arises under, Public Resources  
6 Code section 21168 and Code of Civil Procedure section 1094.5, *et seq.*

## 8 PROCEDURAL HISTORY

### 9 History of the Oroville Facility

10 16. The original federal license for the Oroville facility—previously the Feather River Project of  
11 the Oroville Division, State Water Facilities—was issued in 1957. FERC's predecessor as licensor,  
12 the Federal Power Commission, issued the 50-year license for the Oroville facility (Project No.  
13 2100) to DWR's predecessor as licensee, the California Water Project Authority (Authority). In  
14 1956, the Legislature abolished the Authority, and DWR succeeded as licensee. The Authority's  
15 1952 application that led to issuance of the Oroville facility's license represented that "provision  
16 will be made to make payment for or replace improvements destroyed or injured by the proposed  
17 works."  
18

19 17. During the 1950s, the Authority and DWR repeatedly made assurances to Butte and its  
20 citizens, attempting to allay concerns about negative impacts of the Oroville facility within the  
21 county and region. Along with other proponents of the facility, they argued that short-term losses  
22 to Butte, including loss of local lands and the resultant tax base, would eventually be outweighed  
23 by economic gains to Butte and the state.  
24

25 18. The Oroville facility, constructed between 1961 and 1968, is located on the Feather River in  
26 the Sierra Nevada foothills in Butte County, California. Oroville Dam is five miles east of the City  
27 of Oroville and about 130 miles northeast of San Francisco. As part of the SWP, the facility's  
28

1 operation is not simply for power generation, but for flood management, power generation, water  
2 quality improvement in the Delta, recreation, and fish and wildlife enhancement. However, few of  
3 the benefits from Oroville's operation extend to Butte. For example, with respect to flood  
4 protection, levies constructed along the Feather River after a 1907 flood already provided flood  
5 protection to Butte prior to construction of the Oroville facility. By contrast, the facility's storage  
6 of water above Lake Oroville introduces an additional flood risk.  
7

8 19. In operation since 1968, the Oroville facility encompasses 41,200 acres and includes Oroville  
9 Dam and Reservoir, Hyatt Pumping-Generating Plant, Thermalito Diversion Dam Power Plant, and  
10 the Thermalito Pumping-Generating Plant with combined licensed generating capacity of  
11 approximately 762 megawatts. Oroville Dam, along with two small saddle dams, impounds Lake  
12 Oroville, a 3.5-million-acre-foot (maf) capacity storage reservoir with a surface area of 15,810  
13 acres at its normal maximum operating level. Other project features include Thermalito Diversion  
14 Dam, the Feather River Fish Hatchery, the Fish Barrier Dam, Thermalito Forebay, Thermalito  
15 Afterbay, the Oroville Wildlife Area (OWA), and recreation facilities.  
16

17 20. As the host county and sole location of the Oroville facility, Butte has consistently absorbed  
18 the vast majority of its negative consequences. In 1974, FERC recognized that "farms, mines,  
19 homes, schools, roads and trails of a 'golden historical past' were inundated to create the project."  
20 (Order on Revised Recreation Plan, September 22, 1994.) DWR never compensated Butte for lost  
21 taxes on the improvements it destroyed. Those destroyed improvements included Big Bend, a 70-  
22 megawatt privately-owned hydroelectric plant that previously served as the economic and social  
23 hub for the community of Las Plumas. Notwithstanding substantial harm to the county, DWR does  
24 not pay taxes on the Oroville facility and has declined to make payments lieu of taxes (PILOT).  
25

26 21. The Oroville facility has directly and negatively affected the environment and economy of  
27 Butte, creating significant impacts on land management, water resources and social impacts. The  
28

1 facility uses county natural resources and infrastructure (such as roads, bridges and traffic  
2 controls), and relies on county government services such as law enforcement, fire protection,  
3 emergency services and "first responder" services. These burdens have fallen heavily on Butte,  
4 because in California, county governments provide almost all the services required to meet the  
5 health and welfare needs of county residents, and the public safety of citizens living in and visiting  
6 the unincorporated areas of the county.  
7

### 8 **Federal Proceedings on DWR's License Application**

9 22. On January 11, 2001, FERC issued a letter order approving DWR's request to use the  
10 alternative licensing procedures (ALP) defined in 18 C.F.R. § 4.34(i), for relicensing of the  
11 Oroville facility.

12 23. On January 26, 2005, DWR filed an application with FERC for a new license to own, operate  
13 and maintain the Oroville facility for an additional 50 years, pursuant to the Federal Power Act, 16  
14 U.S.C. §§ 791 (a)-825(r). DWR submitted a Preliminary Draft Environmental Assessment (PDEA)  
15 along with its license application.  
16

17 24. In several filings submitted to FERC addressing this application, Butte documented extensive  
18 impacts of the originally proposed project on the county.

19 25. On September 12, 2005, FERC issued notice of filing DWR's license application and its  
20 accompanying environmental assessment.  
21

22 26. On March 26, 2006, DWR filed an Offer of Settlement (Settlement, or SA) with FERC,  
23 which replaced the proposed action identified in its January 26, 2005 license application. Although  
24 the SA records DWR's concurrence with several dozen stakeholders, DWR did not reach  
25 agreement with other stakeholders that had intervened in the FERC proceeding, including Butte.  
26 Butte, which participated in earlier discussions, was excluded from the final discussions  
27 culminating in the SA.  
28

1 27. In additional filings submitted to FERC addressing the SA, Butte documented its grounds for  
2 concluding that the SA failed to include key stakeholders, failed to address important project  
3 impacts, imposed inappropriate impediments on FERC's ability to monitor license implementation,  
4 and failed to protect public safety and the public interest.

5 28. On September 26, 2006, FERC issued its Draft Environmental Impact Statement (DEIS) for  
6 relicensing of the Oroville facility. Butte and other stakeholders submitted detailed comments on  
7 the DEIS. In addition, stakeholders commented on the DEIS at a public meeting in Oroville on  
8 November 8, 2006.

9 29. Acting as federal lead agency, FERC issued its Final EIS (FEIS) for the Oroville relicensing  
10 project on May 18, 2007. DWR's license application remains pending at FERC.

#### 11 **DWR's Final Environmental Impact Report and Project Decision**

12 30. Acting as state lead agency, DWR determined that preparation and certification of an EIR  
13 addressing the March 21, 2006 SA would be required to comply with CEQA. On May 21, 2007,  
14 DWR issued its Draft EIR addressing its pending application before FERC to obtain a new 50-year  
15 license for FERC Project No. 2100. The DEIR defined the SA as the project under review.

16 31. DWR received more than 50 comment letters on the DEIR during the public comment period  
17 between May 21, 2007 and August 20, 2007. DWR also received extensive comments at a public  
18 hearing in Oroville on June 21, 2007.

19 32. Butte submitted timely written comments to DWR addressing DWR's DEIR for the project.  
20 In addition to providing detailed comments on each chapter of the DEIR, Butte identified several  
21 overarching problems with the DEIR thwarting its ability to serve as a decision-making document  
22 under CEQA:

- 23 • The DEIR failed to address the project's perpetuation and compounding of the tremendous  
24 socioeconomic inequities imposed on Butte by Oroville's operation, the environmental  
25

1 consequences of these inequities, and the mitigation needed to remedy them.

2 • The DEIR failed to address the adverse impacts of preserving present operating terms for the  
3 Oroville facility for the net 50 years.

4 • The DEIR employed a flawed methodology for assessment of cumulative impacts,  
5 discounting small contributions that, taken collectively, could be cumulatively considerable.

6 • The DEIR failed to analyze the impacts of changing climatic, social and environmental  
7 conditions on the SWP, and how those changes could affect the environmental consequences of  
8 DWR's Oroville project.

9  
10 33. Butte's comments on the DEIR documented extensive economic and environmental costs to  
11 Butte associated with Oroville project operations, highlighting the unfairness to the county that the  
12 proposed project would perpetuate. Butte included with its comments two detailed studies  
13 addressing these issues: *Socio-Economic Impacts of the Oroville Facilities on Butte County,*  
14 *California* (2006), and *Operational Impacts of the Oroville Project on Butte County* (2006)  
15 (respectively, attachments A and B to Butte's comments). Butte also cited numerous reports in  
16 which DWR and other researchers recommended assessment of climate change and water  
17 resources far more rigorous than that provided in the DEIR.

18  
19 34. DWR issued its FEIR for the project in June 2008. The FEIR perpetuated most of the serious  
20 errors identified in comments on the DEIR. For example, the FEIR did not identify any significant  
21 socioeconomic and public services impacts to Butte from the project, and declined to mitigate these  
22 effects on Butte. The FEIR also posited that it would be "speculative" to provide the more rigorous  
23 climate change assessment that Butte and other commenters had requested.

24  
25 35. On July 22, 2008, DWR filed its Notice of Determination for the project, and also adopted its  
26 findings and mitigation monitoring program for the project.

27  
28



1                   **EXHAUSTION OF REMEDIES AND PRESENT LACK OF LEGAL REMEDY**

2 36. Petitioner Butte timely participated in the proceedings of respondent DWR, to raise the  
3 objections that form the substance of this petition for writ of mandate. Petitioner has exhausted all  
4 remedies and has no remaining remedy at law to challenge or set aside the final orders of  
5 respondent. Butte also performed all conditions precedent to filing this action, complying with  
6 Public Resources Code section 21167.5 by providing notice of this action to the DWR Director on  
7 August 20, 2008.  
8

9                   **CAUSES OF ACTION**

10 **COUNT ONE: Faulty project definition**

11 37. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 36.

12 38. CEQA requires the lead agency reviewing a project to provide a consistent, stable and  
13 accurate definition of the project under review. Under CEQA Guideline section 15124, the  
14 FEIR's description of the project must also contain sufficient specific information to allow the  
15 public and reviewing agencies to evaluate and review the project's environmental impacts. The  
16 FEIR must not employ a tautological description of the project objectives that skews the project  
17 toward project approval.  
18

19 39. The FEIR inaccurately describes the project setting and objectives, as well as existing and  
20 foreseeable project conditions. The FEIR's project definition is inconsistent, unstable and  
21 inaccurate in at least the following respects, amounting to a failure to proceed as required by  
22 CEQA:  
23

24       a. The project definition, which focuses on "continued operation and maintenance of the  
25 proposed project for electric power generation," obscures DWR's other purposes in obtaining a  
26 project license. That definition is not consistent with references elsewhere in the same FEIR,  
27 which recognize that DWR's project management must also "meet existing commitments and  
28

1 comply with regulations pertaining to water supply, flood management, the environment, and  
2 recreational opportunities.” Those duties stem in part from DWR’s responsibilities as SWP project  
3 manager under the Burns-Porter Act, Wat. Code, §§ 12930, *et seq.*

4 b. The FEIR erroneously claims that the project “is consistent with existing commitments” to  
5 supply water and meet environmental objectives downstream, and that no change to release  
6 schedules is anticipated. If downstream environmental requirements change, or if upstream  
7 hydrology changes, consistency with downstream commitments could produce a very different set  
8 of release schedules. Due to climate change and Bay-Delta problems related to fisheries and water  
9 quality, such changes are not only foreseeable in future SWP operation, but highly likely. Delta-  
10 related constraints on SWP operations include DWR’s obligation to release sufficient water to  
11 comply with Delta water quality standards; its obligation to release water at temperatures and in  
12 amounts sufficient to satisfy obligations under environmental laws like the Clean Water Act and  
13 federal and state Endangered Species Acts; and its commitment to release water, as available, to  
14 meet the needs of its contractors.  
15

16 c. The FEIR inaccurately describes support for the proposed project, which it characterizes  
17 as “near unanimous.”  
18

19 d. The project description does not describe the full effects of, among other project impacts,  
20 management of the Oroville Wildlife Area, the closure of Foreman Creek and the Instream  
21 Structural Placement Program.  
22

### 23 **COUNT TWO: Faulty assessment of the environmental setting**

24 40. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 39.

25 41. CEQA requires that an EIR include an accurate description of the existing environment in the  
26 vicinity of the project from a local and regional perspective. CEQA Guidelines, § 15125.  
27  
28

1 42. The EIR failed to accurately describe the environmental setting of the project, in at least the  
2 following respects: climate change, flood control benefits, Bay-Delta fisheries, water quality  
3 issues, land use, recreational facilities, population, housing, public services, law enforcement and  
4 criminal justice, the financial and socio-economic status of Butte County, water temperature, and  
5 agricultural resources.

6  
7 **COUNT THREE: Faulty definition and use of project baseline**

8 43. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 42.

9 44. CEQA requires that an EIR accurately represent and assess existing baseline conditions. An  
10 accurate baseline allows the EIR to properly evaluate changes, and the resulting impacts, produced  
11 by the project.

12 45. The FEIR inaccurately represents existing baseline conditions at the Oroville facility,  
13 predicating them upon historic rather than existing conditions. It fails to assess the resource  
14 degradation that has already occurred as a result of its current operations. By underestimating the  
15 nature and significance of current project conditions, DWR distorted the significance of  
16 environmental impacts resulting from the proposed project.

17  
18 46. DWR's analysis resulting from this inadequate baseline enabled DWR to evade  
19 responsibility for mitigating significant effects in violation of CEQA. Acting in reliance upon an  
20 EIR inadequately prepared in this respect, DWR failed to proceed as required by CEQA.

21  
22 **COUNT FOUR: Faulty assessment of no-project alternative.**

23 47. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 46.

24 48. CEQA requires a lead agency to analyze a no-project alternative. Under CEQA guidelines,  
25 when the project is the revision of an existing regulatory plan, the no-project alternative must  
26 embrace the continuation of the existing plan, policy or operation into the future. CEQA  
27 Guidelines, § 15126.6.  
28

1 49. The EIR erroneously assumes that the no-project alternative will create no impacts  
2 because old rules would remain in place. This assumption is unwarranted, given the declining  
3 environmental conditions within the project area under the "old rules," as well as impacts that can  
4 reasonably be expected in the foreseeable future (independent of any revision of Oroville  
5 operations due to climate change and changes in SWP operations).

6  
7 50. The Oroville Project EIR's no-project alternative thus fails to acknowledge and analyze what  
8 would reasonably be expected to occur if the project does not proceed. By failing to identify and  
9 analyze a proper no-project alternative, respondent DWR failed to proceed as required by CEQA.

10 **COUNT FIVE: Failure to include a reasonable range of alternatives.**

11 51. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 50.

12 52. CEQA requires that an EIR describe a reasonable range of alternatives that could feasibly  
13 attain most of the project's basic objectives, while avoiding or lessening any significant effects of  
14 the project. CEQA Guidelines § 15126.6.

15  
16 53. The FEIR fails to include a reasonable range of alternatives that could substantially lessen  
17 significant environmental impacts of the project, while feasibly attaining most of its basic  
18 objectives. The two action alternatives studied (the SA and the FERC staff alternative) are highly  
19 similar and would produce similarly significant impacts. Alternatives that should have been  
20 analyzed include an alternative mitigating economic and ecological impacts within the host county  
21 and watershed, and an alternative designed to meet project objectives within changing conditions  
22 including climate change and changing State Water Project operations. By acting in reliance upon  
23 an EIR that lacked an assessment of feasible and environmentally advantageous alternatives, DWR  
24 failed proceed as required by CEQA.

25  
26 **COUNT SIX: Failure to analyze and consider climate change and other significant**  
27 **environmental effects.**  
28

1 54. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 53.

2 55. CEQA requires that an EIR identify and describe the project's direct, indirect, and long term  
3 significant environmental effects. The FEIR's failure to evaluate the project's significant impacts  
4 undermines its value of the EIR as an informational document, and constitutes a failure to proceed  
5 as CEQA requires, in at least the following respects:

6 **a. Climate change:** The FEIR fails to analyze the potential of climate change to magnify the  
7 project's acknowledged environmental effects, including water quality, in-stream habitat  
8 protection, flood control, and recreation. In changing climate conditions, operational changes  
9 proposed by DWR may cause impacts that would not occur under older conditions; perpetuating  
10 Oroville operations for 50 years may cause impacts never previously seen. The FEIR superficially  
11 discusses climate change, and improperly confines that discussion to its cumulative impacts  
12 analysis. For example:

13  
14  
15 • DWR's premise that it would not be "reasonably feasible" to provide further analysis of climate  
16 change in the FEIR cannot be reconciled with DWR's own commitment in other settings to  
17 integrate climate change science into project assessment, DWR's recognition in other settings of  
18 the foreseeably major consequences of climate change for SWP supply and operations, DWR's use  
19 of climate change modeling in other settings, and the Attorney General's positions taken on  
20 CEQA's requirements for climate change assessment in connection with other applicants' projects.

21 • DWR's premise that further climate change assessment is not reasonably feasible also cannot be  
22 reconciled with other California actions and laws, including Executive Order S-3-05 (global  
23 warming) and AB 32.

24  
25 • Assessment of potentially significant impacts with reasonably feasible analysis is required under  
26 CEQA. DWR failed to comply with CEQA in acting in reliance upon an EIR lacking required  
27 analysis of potentially significant climate change impacts.  
28

1           **b. Recreation:** The FEIR fails to adequately analyze secondary impacts to recreation  
2 including fluctuations in reservoir levels, downstream flows, water quality and water temperature,  
3 stemming from operational changes to the SWP and climate change.

4           **c. Transportation and traffic:** The FEIR uses a faulty traffic index to calculate the impact  
5 of additional use on local roadways, ignoring the deteriorated condition of existing roads, and the  
6 overall impact of increased traffic.

7           **d. Air quality:** The FEIR fails to adequately analyze air quality impacts resulting from,  
8 amongst other factors, increased traffic and impacts stemming from traffic on asbestos-containing  
9 unpaved roads.

10           **e. Water resources and quality:** The FEIR fails to provide analysis demonstrating that the  
11 project will improve upon currently deteriorating conditions including low dissolved oxygen levels,  
12 electrical conductivity, bacterial concentrations, mercury concentration in fish tissues, and  
13 foreseeable future impacts due to the effects of climate change. The FEIR fails to adequately  
14 evaluate project impacts on Delta fisheries and water quality, and on water, fisheries and wildlife  
15 above Oroville Reservoir.

16           **f. Government services and socioeconomic effects:** The FEIR's summary denial of any  
17 environmentally significant socioeconomic consequences of the project for Butte constitutes a  
18 failure to proceed as CEQA requires. That denial also cannot be reconciled with FERC's Oroville  
19 Relicensing FEIS, which concluded that the project's operation in Butte "would likely continue to  
20 have a direct negative fiscal effect," and that "[a]ny negative effects on Butte County's fiscal  
21 condition would likely continue." The FEIR avoids analysis of impacts of the project by ignoring,  
22 or erroneously dismissing the effects of new demands on Butte's project-related government  
23 services. The EIR underestimates the impact of recreational visitors on government expenditures,  
24  
25  
26  
27  
28

1 failing to accurately disclose the conclusions of studies indicating significantly higher fiscal  
2 impacts.

3 **COUNT SEVEN: Failure to adequately analyze climate change and other significant**  
4 **cumulative environmental effects.**

5 56. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 55.

6 57. CEQA requires the lead agency to assess the cumulative impacts of the project. Cumulative  
7 impacts from several projects refer to the change in the environment which results from the  
8 incremental impact of the project when added to other closely related past, present, and reasonably  
9 foreseeable probable future projects. Cumulative impacts can result from individually minor but  
10 collectively significant projects taking place over a period of time. CEQA Guidelines, § 15355.  
11 Even when the individual effects of a project are limited, CEQA requires them to be analyzed  
12 where they are "cumulatively considerable," meaning that the incremental effects of an individual  
13 project are considerable when viewed in connection with the effects of past projects, the effects of  
14 other current projects, and the effects of probable future projects. Pub. Res. Code, § 21083(b)(2).  
15 CEQA requires in inquiry into significant adverse environmental impacts, whether they are project-  
16 specific, or caused by combination with the impacts of other projects.

17 58. The FEIR fails to assess cumulative impacts in the manner required by CEQA. It fails to  
18 assess the significant cumulative impacts of perpetuating old rules through the proposed project,  
19 which may lead to additional harms, exacerbating those that have already occurred. DWR's  
20 analysis concludes that these impacts are not significant because they represent incremental  
21 change. This method of analysis violates CEQA's mandate that agencies consider the incremental  
22 effects of a project in connection with the effects of past, current, and future projects.  
23  
24  
25  
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1 59. The EIR also fails to adequately consider the cumulative impact of climate change, which,  
2 when considered together with the project's other effects, significantly compounds the  
3 environmental impacts of the project.

4 **COUNT EIGHT: Failure to mitigate project impacts**

5 60. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 59.

6 61. CEQA requires that a project EIR identify and describe all feasible mitigation measures to  
7 reduce the potentially significant environmental effects of a project. CEQA Guidelines § 15126(c).  
8 Under CEQA, public agencies should not approve projects as proposed if there are feasible  
9 alternatives or feasible mitigation measures available which would substantially lessen the  
10 significant environmental effects of such projects. Pub. Res. Code, § 21002. DWR must also adopt  
11 an adequate mitigation monitoring plan.  
12

13 62. The FEIR and mitigation monitoring plan fail to identify, describe and adopt feasible  
14 mitigation measures that could substantially lessen significant environmental impacts of the  
15 project, including but not limited to the following respects constituting a failure to proceed as  
16 CEQA requires:

17  
18 **a. Government services and socioeconomic effects.** DWR fails to identify and develop  
19 mitigation measures addressing the significant project-related impacts on petitioner Butte,  
20 including environmentally significant socioeconomic impacts and additional government services  
21 necessitated by project operation. Significant impacts include, but are not limited to deterioration  
22 of county roads, strain on law enforcement and emergency services, increased social services  
23 expenses, and population and visitation impacts. These impacts are directly caused by changes in  
24 the physical environment resulting from the proposed project.  
25

26 **b. Recreation.** DWR fails to identify and develop mitigation measures to reasonably address  
27 significant impacts on recreation including, but not limited to bacterial contamination, the closure  
28



1 of Foreman Creek, mercury accumulation in fish tissue, and the Instream Structural Placement  
2 Program.

3 **c. Water resources and quality.** DWR fails to provide mitigation measures adequately  
4 addressing project impacts to water resources and water quality.

5 **d. Climate change.** DWR's proposed mitigation and mitigation monitoring plan fail to  
6 adequately account for the consequences of climate change on project operations.

7  
8 **COUNT NINE: Failure to respond to comments**

9 63. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 62.

10 64. CEQA requires that a lead agency's response must demonstrate a "good faith" reasoned  
11 analysis in response to the environmental issues raised by commenters. Pub. Res. Code §  
12 21091(d)(2)(B); CEQA Guidelines § 15088.

13 65. In its FEIR, DWR failed to provide the good-faith analysis CEQA requires in response to  
14 comments. As one illustration, the EIR fails to respond to pivotal comments on the draft EIR  
15 addressing climate change. DWR responds with conclusory statements unsupported by factual  
16 information to assert that any discussion of changes to Oroville Project operations necessitated by  
17 climate change would be speculative. DWR further claims, without any factual support, that the  
18 variability of California's hydrology excuses the need to conduct thorough analysis of the project's  
19 direct, indirect and cumulative contribution to climate change.  
20

21 **COUNT TEN: Improper deferral of environmental analysis**

22 66. Petitioners reallege and incorporate by reference the allegations of paragraphs 1 through 65.

23 67. CEQA requires sufficient analysis in an EIR to provide decision-makers with enough  
24 information to take environmental consequences into account. Mitigation measures included  
25 within an EIR, but deferred for later elaboration must be feasible and an agency must commit to  
26 specific performance criteria to ensure compliance.  
27  
28

1 68. DWR's EIR for the Oroville project improperly defers for further study recreational impacts  
2 including, but not limited to the closure of Foreman Creek and the Instream Structural Placement  
3 Program. The mitigation measures as described within the Oroville Project EIR are not specific in  
4 their performance criteria, yet they assume that such measures will reduce environmental impacts  
5 to less than significant levels. By deferring description and analysis of these mitigation measures,  
6 DWR has denied decision-makers and the public necessary information to evaluate the  
7 environmental impacts of the project, and failed to proceed as CEQA requires.  
8

9 **COUNT ELEVEN: Approval of defective and legally inadequate findings**

10 69. Petitioner realleges and incorporates paragraphs 1-68.

11 70. CEQA requires the lead agency to makes specific findings in connection with its approval of  
12 a project. (CEQA Guidelines, § 15091.) These findings must be supported by substantial evidence  
13 in the record, and must present some explanation to supply the logical step between the ultimate  
14 finding and the facts in the record.  
15

16 71. DWR adopted findings failing these requirements of CEQA, including but not limited to: (1)  
17 DWR's conclusion that "the proposed project is consistent with existing commitments to meet  
18 statutory, contractual water supply, flood management and environmental requirements..."; (2)  
19 DWR's conclusion that its project has "near-unanimous support"; (3) DWR's refusal to adopt  
20 specific findings and mitigation measures addressing environmentally significant impacts relating  
21 to socioeconomic impacts and climate change.  
22

23 **PREJUDICIAL ABUSE OF DISCRETION.**

24 72. Petitioner re-alleges and incorporates paragraphs 1-71.

25 73. Each of the unlawful actions alleged above constitutes an abuse of respondents' discretion  
26 and failure to proceed in the manner required by law. Each abuse of discretion is prejudicial to the  
27 rights of petitioner and the public. DWR's faulty CEQA assessment deprived petitioners of  
28

1 favorable alternatives and feasible mitigation measures that DWR could have adopted to protect  
2 the environment and economy of Butte County.

3  
4 **PRAYER FOR RELIEF**

5 WHEREFORE, petitioner County of Butte prays that this Court:

6  
7 1. Issue its writ of mandate setting aside the orders of respondent, including its  
8 certification of the FEIR as adequate;

9 2. Enjoin DWR's project until and unless respondent Department of Water Resources  
10 lawfully approves the project in the manner required by CEQA, including enforceable mitigation  
11 measures to prevent environmental and related socioeconomic harm within the County of Butte;

12 3. Award petitioner costs, and attorneys' fees under section 1021.5 of the Code of Civil  
13 Procedure; and

14 4. Grant such further relief that the Court deems just.

15  
16  
17 Dated: August 21, 2008.

Respectfully submitted,

18 BRUCE ALPERT, COUNTY COUNSEL

19 ROSSMANN AND MOORE, LLP  
20 ANTONIO ROSSMANN  
21 ROGER B. MOORE  
22 JENNIFER SEIDLBERG

By: 

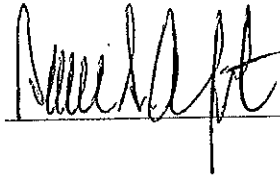
Bruce Alpert

23 Attorneys for Petitioner COUNTY OF BUTTE  
24  
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28

VERIFICATION

I, Bruce Alpert, am counsel to petitioner County of Butte and am authorized to make this verification on behalf of the County of Butte. I have read the above petition for writ of mandate and verify that its contents are true and correct to the best of my knowledge and belief. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 21, 2008



A handwritten signature in cursive script, appearing to read "Bruce Alpert", is written over a horizontal line.

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# EXHIBIT 3

EDMUND G. BROWN JR.  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



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July 8, 2009

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Thomas Berliner  
Duane Morris LLP  
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RE: *County of Butte v. Department of Water Resources, et al.*  
*Plumas County, et al. v. California Department of Water Resources*  
Yolo County Superior Court Consolidated Case No. CV09-1258

Dear Counsel:

On Monday July 6, 2009, I received an inquiry from Roger Moore asking when the Department of Water Resources anticipates lodging the administrative record. The Department of Water Resources informs me that it will have the record completed, certified, and lodged by September 15, 2009. This date assumes: (1) staff encounters no unforeseen technical problems in finalizing the record in electronic format once staff are done organizing, reviewing, and processing the materials; and (2) the Department begins immediately to finalize and electronically paginate those sections of the record that it deems complete, and for which it has received no comments from the parties as to content.

As you are aware, the Department of Water Resources has circulated draft indices of most sections of the record in an effort to keep the parties informed of the Department's progress and to provide an opportunity for comment prior to the Department lodging the record. The Department had hoped that by providing draft indices of topically organized sections of this

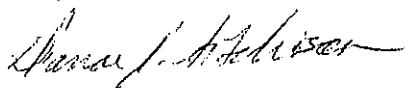
July 8, 2009  
Michael Jackson  
Roger Moore  
Thomas Berliner  
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record in advance of lodging, it would be possible for the parties to identify and resolve concerns over record content, avoiding costly motions.

To date, however, the Department of Water Resources has received no comments from any party on the indices that have been circulated with my letters of April 23, 2009, May 21, 2009, and June 19, 2009. While the Department of Water Resources continues to be willing to discuss record content concerns with the parties, it is necessary for the Department to immediately finalize as many sections of the record that it can and begin electronic pagination to meet a September 15, 2009, lodging date. For this reason, the Department will begin finalizing and electronically paginating those sections of the record for which it has previously circulated draft indices and received no comments. The Department of Water Resources anticipates sharing one additional draft index, hard copy correspondence, within the next week, and will take comments on this section until July 24th. Due to time constraints with the production process, the Department does not anticipate sharing a draft index of the record section with internal staff files. As I have previously disclosed, the Department will not be indexing email.

I hope this information is helpful. Please contact me if you would like to discuss further.

Sincerely,



DANAE J. AITCHISON  
Deputy Attorney General

For EDMUND G. BROWN JR.  
Attorney General

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July 8, 2009  
Michael Jackson  
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Thomas Berliner  
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# EXHIBIT 4

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July 17, 2009

*Via email and U.S. Mail*

Danae J. Aitchison, Deputy Attorney General  
California Department of Justice  
1300 I Street, Suite 125  
Sacramento, CA 94244-2550

Re: Record completion in *County of Butte v. Department of Water Resources c/w County of Plumas v. Department of Water Resources* (Yolo County Superior Court, Consolidated Case No. CV09-1258)

Dear Danae:

On behalf of petitioner Butte County, this letter continues our discussion of respondent Department of Water Resources' inability to complete the administrative record in the above-referenced consolidated cases, despite the requirement of CEQA for DWR to do so (Pub. Res. Code, § 21167.6(b).) As we discussed, the first anniversary of the filing of these consolidated actions will pass on August 21, 2009. The original due date for record preparation passed on October 27, 2008, and the last due date achieved by stipulation passed on February 27, 2009. When we spoke on July 6, I emphasized the need for DWR to commit to a date certain for record completion, which we hoped would be this month. I reiterated this request in a message sent to you this Wednesday, July 8.

Your July 8, 2009 letter to me announces an anticipated completion date of September 15, 2009, but suggests that the actual date could be later if, for example, there are "unforeseen technical problems." That date would provide no opportunity for Butte and Plumas Counties, and other members of the public, to study the record before the State Water Resources Control Board must act on DWR's application for water quality certification under section 401 of the Clean Water Act. As you are aware, one of the purposes of the EIR under challenge in this action is to inform that review. Months ago, Butte and Plumas Counties expressed concern that DWR was seeking to expedite section 401 certification even as it sought to postpone completion of the CEQA record. Yesterday Butte County received the State Board's 21-day notice for its certification decision.

We are aware of DWR's view, expressed in a March 2, 2009 letter to counsel, that section 401 certification does not have "any bearing" on the timing of DWR's record completion. That perspective

relies upon Public Resources Code section 21167.3, which ordinarily allows a responsible agency to rely on the lead agency's EIR for its CEQA determinations, with any approvals at the applicant's risk of set-aside pending final determination of the CEQA action. That provision does not exonerate the State Board from its duty to ensure that any certification conforms to other provisions of law, including section 401 of the Clean Water Act. It strains credulity to believe that the extensive record DWR is preparing will have no documents bearing upon the State Board's water quality determination that are worthy of public review.

For the foregoing reasons, Butte County would be willing to agree to extension of the deadline for the record to September 15, 2009, provided that DWR (1) advises the State Board that it is withdrawing its present request for section 401 certification (as it has done before when documentation remained incomplete); and (2) does not request further action from the State Board on section 401 certification until the completed administrative record in this action has been available for at least 60 days. That agreement would not waive the counties' opportunity to object to further extension requests.

We have spoken with counsel for Plumas County, and verified that Plumas County's views correspond to those expressed here.

Respectfully,

/s./

Roger B. Moore  
Counsel for Butte County

cc: Michael Jackson  
Thomas Berliner  
John Schlotterbeck  
Margaret M. Sohagi  
Emily Cote  
Amelia T. Minaberrigarai  
Amy Naamani  
David Aladjem

# EXHIBIT 5

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Attorney General

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DEPARTMENT OF JUSTICE



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July 23, 2009

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RE: *County of Butte v. Department of Water Resources, et al.*  
*Plumas County, et al. v. California Department of Water Resources*  
Yolo County Superior Court Consolidated Case No. CV09-1258

Dear Counsel:

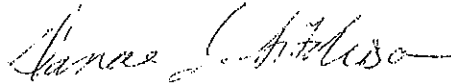
This letter responds to Roger Moore's letter of July 17, 2009, stating that Butte County would be willing to agree to a September 15, 2009, lodging date for the administrative record on two conditions: (1) if DWR withdraws its application for a section 401 certification from the State Water Resources Control Board; and (2) if DWR requests no further action on the section 401 certification by the Water Board until the administrative record in these cases has been available for 60 days. The Department of Water Resources has considered Butte County's position, and at this time does not plan to withdraw its application for a section 401 certification from the Water Board. The Department's proposed September 15, 2009, lodging date for the record in these cases is based solely on the ability of Department staff to complete the record, including the computer processing time necessary to have the record available on DVD for the court and the parties. As we have previously stated, the Department is prepared to lodge the record on September 15, 2009, absent unforeseen technical difficulties. While the timing of the

July 23, 2009  
Michael Jackson  
Roger Moore  
Thomas Berliner  
Page 2

section 401 certification process has in the past and may continue to change, it does not affect how rapidly the Department can complete the administrative record for the CEQA litigation.

While Mr. Moore states that, "it strains credulity to believe that the extensive record DWR is preparing will have no documents bearing upon the State's Board's water quality determination that are worthy of public review," the Department of Water Resources has never made such a claim. Please recall that the Department of Water Resources has provided extensive draft indices of all sections of the administrative record, excluding indices of only email and staff files. The submitted indices include literally thousands of documents that have been publicly accessible on the Oroville Facilities Relicensing website for many years. These documents have been and continue to be available to the public and to the Water Board for its administrative process. The formulation of such documents into a California Environmental Quality Act litigation record is not a precondition to their use and availability.

Sincerely,



DANAE J. AITCHISON  
Deputy Attorney General

For EDMUND G. BROWN JR.  
Attorney General

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Michael Jackson  
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# EXHIBIT 6





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Michael A. Swiger  
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July 9, 2009

Rodney R. McInnis  
Southwest Regional Administrator  
NOAA National Marine Fisheries Service  
501 West Ocean Boulevard, Suite 4200  
Long Beach, CA 90802

Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

**Re: Oroville Facilities, FERC Project No. 2100-134, TN 2009/02370;  
Request for Thirty-Day Comment Period for Draft Biological Opinion for  
Endangered Species Act Section 7 Consultation**

Dear Regional Administrator McInnis and Secretary Bose:

By letter dated July 31, 2007, the Federal Energy Regulatory Commission (Commission or FERC) requested formal consultation with the National Oceanic Atmospheric Administration's National Marine Fisheries Service (NMFS) under Section 7 of the Endangered Species Act with regard to the Commission's relicensing of the California Department of Water Resources' (DWR) Oroville Facilities, Project No. 2100 (Project).<sup>1</sup> In its letter, the Commission explained that its Final Environmental Impact Statement for the relicensing, issued May 18, 2007, concluded that the proposed action is likely to adversely affect the federally listed threatened Central Valley (CV) spring-run Chinook salmon (*Oncorhynchus tshawytscha*) and the CV steelhead (*O. mykiss*), and adversely modify critical habitat for these species.<sup>2</sup> The Commission's letter also concluded that the proposed action may affect, but is unlikely to adversely affect, the threatened Southern Distinct Population Segment (DPS) of North American green sturgeon (*Acipenser medirostris*).<sup>3</sup> Accordingly, the Commission's July 2007 letter

<sup>1</sup> Letter from Timothy J. Welch, FERC, to Rodney R. McInnis, NMFS, Project No. 2100-134 (issued July 31, 2007) (hereinafter, July 2007 Letter).

<sup>2</sup> *Id.* at 1; see Final Environmental Impact Statement §§ 3.3.5, 5.5.2, Project No. 2100-052 (issued May 18, 2007) (hereinafter, Final EIS).

<sup>3</sup> July 2007 Letter at 2. Although the Commission's Final EIS had concluded that the proposed action would have no effect on the green sturgeon, Final EIS § 3.3.5, at p. 190, the Commission's July 2007 Letter noted that it

requested NMFS's concurrence with its determination regarding the North American green sturgeon and asked NMFS to prepare and submit its biological opinion on listed salmonids.<sup>1</sup>

On July 6, 2009, NMFS submitted its Oroville Dam Draft Biological and Conference Opinion (Draft BO) to the Commission.<sup>2</sup> The Draft BO concludes that the Commission's proposed action is not likely to jeopardize Sacramento River winter-run Chinook salmon, CV spring-run Chinook salmon, CV steelhead, and the Southern DPS of North American green sturgeon or adversely modify designated or proposed critical habitat.<sup>3</sup> As part of the Incidental Take Statement, however, the Draft BO sets forth several "reasonable and prudent measures" (RPMs) that "NMFS believes . . . are necessary and appropriate to minimize the effect of incidental take of Sacramento River winter-run Chinook salmon, CV spring-run Chinook salmon, CV steelhead, and North American green sturgeon resulting from the proposed action."<sup>4</sup>

When preparing the Draft BO, NMFS provided DWR an opportunity to review early versions of the Draft BO both to ensure the accuracy of the factual information set forth in the Draft BO, and to assess possible effects of the RPMs on proposed license measures contained in the long-standing relicensing settlement agreement, to which NMFS is a party.<sup>5</sup> DWR appreciates the opportunity to work through these issues with NMFS and believes that the Draft BO has been improved as a result of the consultation. DWR remains concerned, however, that the RPMs set forth in the Draft BO may have the potential to significantly affect Project operations, including water supply and/or power generation, as well as DWR's ability to implement the relicensing settlement agreement. Accordingly, DWR is in the process of developing a hydrologic model to analyze effects that implementation of the RPMs would have on Project operations. The results of this modeling effort are expected to be completed by around July 17, 2009.

Given DWR's ongoing analysis, and the importance of understanding the operational impacts of the RPMs on the Project and the settlement, DWR believes that the two-week comment period on the Draft BO established by NMFS would not give DWR or other parties a meaningful opportunity to comment.<sup>6</sup> Rather, DWR believes that a thirty-day comment period – commencing the day after the Draft BO was filed with FERC – is warranted.<sup>10</sup> This will allow DWR to complete and distribute its quantitative analysis, which will better inform its comments on the Draft BO as well comments from FERC and possibly others. Because the Section 7 consultation process is not the only remaining matter to complete prior to the Commission's

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had modified this conclusion based on the Final Biological Assessment, which DWR submitted to NMFS on July 6, 2007, documenting observations of green sturgeon in the vicinity of the Project's Thermalito Afterbay in 2006. July 2007 Letter at 2.

<sup>1</sup> July 2007 Letter at 2.

<sup>2</sup> Oroville Dam Draft Biological and Conference Opinion, Project No. 2100-134 (filed July 6, 2009) (hereinafter, Draft BO).

<sup>3</sup> Draft BO §§ 8, 9.

<sup>4</sup> *Id.* § 10.3, at p. 263.

<sup>5</sup> Settlement Agreement for Licensing of the Oroville Facilities, Project No. 2100-052 (filed Mar. 24, 2006).

<sup>6</sup> Letter from Rodney R. McClinis, NMFS, to Kimberly D. Bose, FERC at 2, Project No. 2100-134, TN 2009/02370 (filed July 6, 2009).

<sup>10</sup> As the Draft BO was filed with FERC on July 6, 2009, the thirty-day comment period requested herein would extend through Wednesday, August 5, 2009.

action on DWR's relicensing application, granting a thirty-day comment period on the Draft BO would not cause a delay in the overall relicensing schedule.<sup>11</sup>

For these reasons, DWR respectfully requests NMFS and the Commission to establish a revised, thirty-day comment period for the Draft BO, commencing on July 7, 2009 – the date following NMFS's submission of the Draft BO to the Commission.

If you have any questions regarding this request, please do not hesitate to contact the undersigned.

Respectfully submitted,



Michael A. Swiger  
Counsel to the California Department  
of Water Resources

---

<sup>11</sup> The California State Water Resources Control Board has not yet issued its water quality certification under Section 401 of the Clean Water Act, a prerequisite to Commission action.

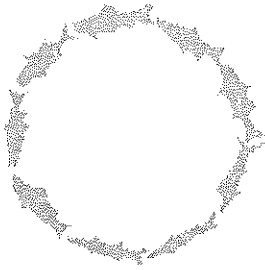
**CERTIFICATE OF SERVICE**

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 9th day of July, 2009.

/s/ Mealear Tauch  
Mealear Tauch  
Van Ness Feldman, P.C.  
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# EXHIBIT 7



## California Sportfishing Protection Alliance

*"An Advocate for Fisheries, Habitat and Water Quality"*

Chris Shutes, FERC Projects Director

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July 21, 2009

Rod McInnes, Regional Administrator  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Service  
501 West Ocean Blvd, Suite 4200  
Long Beach, CA 90802-4312

RE: COMMENTS on the Oroville Dam Draft Biological Opinion, Oroville Facilities P-2100-134, TN 2009/02370

Dear Mr. McInnes:

Thank you for the opportunity to comment on the Oroville Dam Draft Biological and Conference Opinion (Draft BO for Oroville), filed with the Federal Energy Regulatory Commission on July 6, 2009 (accession number 20090708-0149).

In preface to these comments, CSPA points out that it has reviewed NMFS's Biological and Conference Opinion for the Central Valley Project and State Water Project Operations and Criteria Plan for salmon, steelhead and green sturgeon (OCAP BO). CSPA supports the OCAP BO as providing minimum requirements needed to avoid extirpation of the listed species it considers, and begin their recovery.

CSPA does not understand, however, how NMFS can issue a jeopardy finding in the OCAP BO on the combined operations of the CVP and SWP, but then issue a no jeopardy finding in the Draft BO for Oroville that addresses a central feature of combined CVP and SWP operations, and the major storage reservoir for the SWP, which has over 3 million acre-feet of storage and additional storage upstream.

Moreover, the analysis in the OCAP BO and that in the Draft BO for Oroville appear fundamentally disconnected. While the OCAP BO sets a number of actions with specific requirements, performance measures and timelines, the Draft BO for Oroville, in conformance with the Oroville Settlement Agreement, includes reconnaissance studies and processes for improvements in lieu of potential defined measures. This is most notable in the respective conditions for measures to protect water temperatures.

The OCAP BO recognizes a fundamental reality: recovery of Central Valley salmonids depends on restoring salmonids to the habitat upstream of Central Valley rim dams.

Reliance on habitat below rim dams is unsustainable in the face of climate change. Yet while the OCAP BO requires pilot projects for re-introductions of salmon and steelhead upstream of Shasta Reservoir, and steelhead upstream of Folsom Reservoir, to be functioning on the ground by dates certain, the Draft BO for Oroville contemplates only the Habitat Expansion Agreement with no defined timeline for implementation.

Moreover, the Draft BO for Oroville analyzes the condition of the listed species in the Feather River watershed according to the inadequate standard of the FEIS and FEIR for the relicensing of the Oroville Facilities. These documents ask not whether the ongoing operation of the project will jeopardize listed species, but merely rather whether or not the proposed action represents an improvement over existing conditions. That is not the standard.

The Draft BO for Oroville presents the Habitat Expansion Agreement as the reason for a no jeopardy finding for spring-run Chinook for the Feather River drainage. Apparently, increasing the geographic range of spring-run chinook is supposed to reach a threshold of no jeopardy because expanded range will offset the possibility of a catastrophic event such as a fire in the Mill Creek, Deer Creek , and Butte Creek region. However, there is no certainty that an HEA will achieve the desired results, or even that those results if achieved would warrant a no jeopardy finding. It appears to us that the appropriate finding would be a jeopardy finding with a Reasonable and Prudent Alternative to mitigate jeopardy, including a backstop should the HEA fail to reach a threshold needed to eliminate jeopardy.

Even assuming adequate mitigation for spring-run Chinook under the HEA, there is a broader assumption that steelhead will also benefit from the HEA. This assumption is yet another step removed, especially if a trap and haul approach is used under the HEA for spring-run. Under such circumstances, will NMFS also require trap and haul for steelhead, or will it be satisfied with unproven channel modifications and unspecified flows to enable the benefits of those modifications, in the area downstream of the project? A requirement for a defined amount of spawning escapement for spring-run does not appear to mitigate the effects of the proposed action on Central Valley steelhead.

The facility modifications contemplated in the Oroville Settlement Agreement do not appear to provide room for a temperature control device should the finding of investigation during the first few years of the new license term be that such a device is needed. The estimated total cost to DWR of temperature modifications at Oroville is not to exceed \$60 Million (Section 108.4f). However, the Lake Shasta temperature control device completed in 1994 cost \$100 Million. A Final BO for Oroville should specify that the measures needed to meet the required temperatures in the Feather River downstream of Oroville, using whatever means are necessary, without reference to a cost cap.

Over the last week, a Draft 401 Certification dated June 23, 2009 has been made available by State Water Resources Control Board. This Draft 401 Certification includes specific timelines and standards required to protect beneficial uses, including many that are pertinent to listed species. At minimum the Final BO for Oroville should line up with

the requirements set forth in the Draft 401 insofar as these requirements affect listed species.

The disconnect between the BO for OCAP and the Draft BO for Oroville becomes particularly problematic in light of the Settlement Agreement's allowance for DWR to ease the flow requirements from the Oroville facilities should Oroville drop below 1.5 million acre-feet of storage. The storage in Lake Oroville is a combined function of meteorological conditions and human action. However, the Draft BO for Oroville makes no defined standard or restriction on human action to avoid operation of Lake Oroville through OCAP that would reduce the likelihood of operation of Oroville at low pool, either episodically or chronically. CSPA believes that this flaw is inherent in disconnecting the Biological Opinions for OCAP and Oroville, and that this flaw is exacerbated by the lack of defined standards for operation of Oroville in either document. This flaw leaves a regulatory gap that is backstopped only by a discussion process among DWR, NMFS and resource agencies other than NMFS. While NMFS contemplates a re-initiation of consultation is the event that temperature requirements in the Lower Feather River fail to be met on a repeated basis, the threshold for that re-initiation, and the possible remedies, are completely open to debate and even to legal argument.

The Feather River Technical Team and the Green Sturgeon Technical Subcommittee have no apparent ability to address the overall operation of the SWP under OCAP. There does not even appear to be a defined relationship between these entities and the OCAP Water Operations Management Team (WOMT), as there is for the other technical teams for other watersheds that are defined in the OCAP BO. Again, this situation amounts to a regulatory gap that gives unwarranted latitude to DWR and its operation of Lake Oroville. Given the severe drawdown of Oroville in 2008-2009, and the current operation of the reservoir out of which water is flowing at 18,000 af per day and appears headed to drop below 1.5 million acre-feet of storage on about August 1 of this year, the issue appears to CSPA to be chronic.

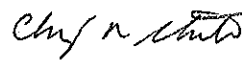
The Final BO for Oroville should set numeric standards for operation to preserve the cold water pool, not simply a process for how to carry out damage control once threshold numbers are passed.

The two week comment period for review of the Draft Biological Opinion for Oroville is inadequate to provide time for comments. This is one of the few issues on which we agree with DWR. Our comments at this time have therefore been limited to high level issues. Given an appropriate comment period for a 300 page document, which must be considered in the context of the OCAP BO of well over 1000 pages with appendices, our comments would surely be more extensive.

Thank you for the opportunity to comment on the Oroville Dam Draft Biological and Conference Opinion for the proposed action of relicensing the Oroville Facilities.



Respectfully submitted,



Chris Shutes  
FERC Projects Director  
California Sportfishing Protection Alliance

cc:

Kimberley Bose, Secretary  
Federal Energy Regulatory Commission  
(via e-filing)

Howard Brown, NMFS

Russell Strach, NMFS

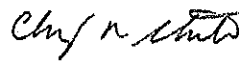
Russ Kanz, SWRCB

Service list

CERTIFICATE OF SERVICE

I hereby certify that I have on this day provided a true copy of these comments on the National Marine Fisheries Service's Draft Biological Opinion for Oroville Dam to the Service List for the above referenced proceeding, P-2100-134.

Berkeley, California  
July 21, 2009

A handwritten signature in cursive script, appearing to read "Chris Shutes", with a horizontal line extending to the right from the end of the signature.

Chris Shutes